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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-486

VIRGIN ISLANDS HOTEL ASSOCIATION (U.S.), INC.,
a corporation, *Petitioner*

v.

VIRGIN ISLANDS WATER & POWER AUTHORITY,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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v.

VIRGIN ISLANDS WATER & POWER AUTHORITY, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Virgin Islands Hotel Association (U.S.), Inc. prays that a writ of certiorari issue to review the final decree of the United States Court of Appeals for the Third Circuit entered May 23, 1973 (Case No. 72-1996), denying Petitioner's petition for rehearing.

INTRODUCTION

The genesis of this case is a ratemaking proceeding conducted by the Virgin Islands Water & Power Authority (hereafter "the Authority"), a publicly-owned utility serving the whole of the Virgin Islands. Adjudicatory hearings were denied and the hearings

afforded, although purportedly legislative in nature, were a pretense. They contributed nothing to the rate-making process and had none of the elements of fair play. Yet, the hearings were deemed adequate by the court below, despite the hearing procedure mandated by § 105(a)(12) of the Virgin Islands Water & Power Authority Act, 30 V.I.C. 101, *et seq.* (1964)[1] and the procedural safeguards assured by the Due Process Clause of the Fourteenth Amendment.[2]

Affecting the Authority alone, this is a particularized proceeding. A self-regulating publicly-owned utility, because of its inherently conflicting proprietary and regulatory functions, must be held to procedural safeguards at least as rigorous as those required for regulatory agencies having jurisdiction over the rates of privately-owned utilities, and such agencies have traditionally been required to afford trial-type rate hearings. Investors and ratepayers of privately- and publicly-owned utilities, alike, are entitled to procedural due process to ensure the establishment of reasonable rates.

The Third Circuit Court of Appeals nevertheless approved the meaningless hearings afforded here. Relying basically on the reasoning of this Court in *United States v. Florida East Coast Railway Co.*, 93 S. Ct. 810 (1973), the court held that the proceeding was generalized and that, if the Administrative Procedure Act, 5 U.S.C. § 551, *et seq.* (1957) were applicable (although it is *in*applicable to the Virgin Islands), a rulemaking hearing would be required. It also held that cross-

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[1] App. A, pp. 1a, 12a.

[2] That Amendment was extended to the Virgin Islands by § 3 of the Revised Organic Act of the Virgin Islands of 1954, as amended, 48 U.S.C.A. § 1561.

examination was properly denied because of the absence of "any specific statutory procedures such as the Administrative Procedure Act . . . [which] necessitates greater leeway" in the courts,[3] and because of the failure of the Authority to demonstrate that it had been prejudiced by the denial of oral cross-examination. Accordingly, the court below concluded that the Authority's sham hearings had properly been approved. This is a shocking decision which jettisons 100 years of case law assuring constitutional procedural safeguards in traditional utility ratemaking proceedings.

By its silence, the court below also sanctioned utility rates which are substantially higher than necessary to produce a reasonable general level of income and which are unduly discriminatory, although the full extent of the excessiveness and the undue discrimination is unknown because of an incomplete record caused by the Authority's refusal to meet its burden of proof. The court thereby discarded the principle of constitutional law established by this Court in *F.P.C. v. Natural Gas Pipeline Co.*, 315 U.S. 575 (1942), and reflected in 30 V.I.C. § 105(a)(12), for the administrative determination of fair and reasonable rates.

If the decision below stands, it could mark the beginning of the end of traditional utility ratemaking procedures and principles; it would render the Authority Act, especially § 105(a)(12), ineffectual.

CITATIONS TO OPINIONS BELOW

The opinion of the court of appeals, issued April 12, 1973, is reported in 476 F.2d 1263 (1973) and is printed

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[3] App. G, pp. 73a-74a.

in Appendix G to this Petition, p. 65a. An order denying rehearing was issued May 23, 1973, and is printed in Appendix H to this Petition, p. 80a. The initial opinion of the court of appeals is reported in 465 F.2d 1272 (1972) and is printed in Appendix D, p. 51a.

The final order of the District Court of the Virgin Islands, entered October 3, 1972, is unreported; it is printed in Appendix F, p. 63a. The opinion of the district court, February 2, 1972, is reported at 54 F.R.D. 337 (1972), and is printed in Appendix C, p. 35a.

JURISDICTION

The jurisdiction of the district court was invoked under 4 V.I.C. § 74(5). The judgment of the Court of Appeals for the Third Circuit was entered on April 12, 1973; jurisdiction was based on 28 U.S.C. § 1291. An order of this Court, dated July 24, 1973, extended the time for filing a petition for writ of certiorari to September 20, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

THE QUESTIONS PRESENTED

1. Whether the Authority is required by 30 V.I.C. § 105(a)(12) and by procedural due process to conduct adjudicatory hearings in its ratemaking proceedings, rather than the legislative-type hearings accorded; or, if legislative-type hearings are legally permissible, whether the Authority can lawfully accord legislative-type hearings which deny all procedural safeguards and are otherwise meaningless.

2. Whether the Authority can properly make a determination of reasonable electric power rates under 30 V.I.C. § 105(a)(12) and the Fourteenth Amendment

of the Constitution without proving that its projected electric revenue requirements are justified by reasonable costs of its electric operation and applicable debt service requirement and without proving that its electric rate schedules are devoid of unfairness and undue discrimination; in other words, whether the Authority can lawfully disregard its statutory ratemaking standard of "reasonable rates".[4]

STATUTE INVOLVED

The statutory provisions primarily involved are §§ 101(f), 105(a), and 105(a)(12) of the Virgin Islands Water & Power Authority Act, Title 30 Virgin Islands Code § 101, *et seq.* (1964). The Act is printed in its entirety in Appendix A, p. 1a.

STATEMENT OF THE CASE

On November 10, 1971, the Authority announced that its electric power rates would be increased effective December 1, 1971, the increases having been recommended by the consulting firm of Jackson & Moreland in a "revenue report", dated October 31st.[5] Legislative-type "hearings" were held the week of November 14th, and on December 3, 1971, the Authority readopted the increased rates. On the same day, the Virgin Islands Hotel Association (U.S.), Inc. (hereafter "the Association") filed for an injunction against the increased rates on behalf of its members which comprise most of

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[4] 30 V.I.C. § 105(a)(12).

[5] This report found a minimum 10% increase in revenues necessary "to overcome the estimated deficiency as of fiscal 1972," but to accomplish "the benefits for the entire fiscal year," an adjusted minimum of 15.2% was desirable, yet to allow for contingencies for future increases in expenses and for financing," rates yielding "increased revenues of approximately 20 percent" were projected.

the hotels in the Virgin Islands. It alleged that the Authority had "acted in gross disregard of the Authority Act and of procedural due process."[6] On the basis of the first two *Morgan* cases[7] and the hearing requirement of 30 V.I.C. 105(a) (12),[8] the court held that the Authority's hearings denied the Association's members "requisite procedural due process safeguards".[9] It also held that the Authority's rate action was not "reasonable and permissible", having been based on a revenue study rather than a rate study.[10] The court enjoined the increased rates and stayed the injunction for ten months to enable the Authority to make a "proper determination of a rate schedule" with a supporting "rate study" and to hold "proper hearings."[11]

The court of appeals agreed that the Authority's hearings did not accord with 30 V.I.C. § 105(a)(12) but held that "meaningful", rather than adjudicatory,

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[6] App. C, p. 35a.

[7] *Morgan v. United States*, 298 U.S. 468, 480 (1936); *Morgan v. United States*, 304 U.S. 1, 18, reh. den. 304 U.S. 23 (1938); App. C, p. 43a.

[8] This provision requires the Authority

> "to *determine* . . . reasonable rates . . . for electric power . . . Provided, . . . That . . . before changes in such general rate structures are made . . . *a public hearing shall be held with respect thereto* before the Board or before such *hearing officer* . . . as the Board may designate to give interested persons an opportunity to advise the Board of their views and *evidence* in support thereof, and *upon such hearing* . . . to alter, suspend or revoke such changes." [Emphasis added]

[9] App. C, pp. 42a-44a; Finding Nos. 8, 9, 10, 12, App. C, pp. 47a-48a; Conclusion Nos. 5 and 6, App. C, p. 48a.

[10] App. C, pp. 41a-42a; Finding Nos. 6, 7 and 11, App. C, pp. 47a-48a.

[11] App. C, p. 44a, 49a-50a.

hearings are mandated.[12] It also disagreed that the Authority has a duty under 30 V.I.C. § 105(a)(12) to make "rate studies as such" and ordered the district court's judgment modified accordingly.[13]

On remand, the Authority again held legislative-type "hearings". They differed from the original hearings essentially in that they were conducted by a member of the Authority's Governing Board which had twice previously approved the increased rates, the Authority presented three new engineering reports, and only written questions were permitted of the reports' authors. All of the reports fell far short of successfully justifying the projected electric revenue requirements in terms of reasonable electric operating costs (including financing costs) and the applicable debt service requirement;[14] they failed to attempt to establish that the increased

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[12] The court said:

> "The rate-fixing procedure created by 30 V.I.C. § 105(a)(12) contemplates a *meaningful* public hearing at which interested persons can present their views and present *evidence in support thereof*. Concomitant with such a hearing are the essential requirements of adequate notice, dissemination to the public of facts and figures on which the Authority relies, and an opportunity afforded to those attending the hearing to rebut such facts and figures." (App. D, pp. 56a-57a.)

[13] App. D, pp. 56a, 57a-58a.

[14] The updated Jackson & Moreland study shows on its face that the increased rates would yield debt service coverage for fiscal 1973 of 2.34, compared with the "acceptable" coverage of 1.92 estimated in its October 1971 study, and the coverage of 1.50 required by the Authority's bond covenants. The result of the study indicates that, out of $3,550,000 in increased revenues, at least $1,316,000 (or 37%) are in excess of those needed to provide a coverage of 1.92. of which at least $1,240,000 is attributable to the increased rates for Large Power Users, the class comprised mainly of the Association's members.

The report of D.S.S. Engineers, Inc. shows on its face that $100,000 in costs attributable to water had been improperly allo-

rate schedules were fair and devoid of undue discrimination.[15] Objections by the Association to the hearing procedure and its contentions that the reports were inadequate were to no avail. Specifically, the Association objected to the inadequate 5-week hearing notice and dissemination, to the Authority's failure to meet its burden of proof (as a cure for which the Association moved for a two-month continuance within the stay period to enable the Authority to assemble necessary data from its raw statistical and financial records and to enable its rate expert to prepare testimony for the Association based upon such data), to the Authority's failure to have its witnesses sworn, to the substitution of written questions for oral cross-examination, to the denial of an opportunity for rebuttal, and in general, to the denial of a trial-type hearing. The Association's counsel was permitted, however, to make offers of proof as to what the Association would have established had it been given an opportunity to cross-examine the Authority's witnesses under oath and to present rebuttal testimony.

Without making any adjustments for the evidence of record that the increased rates were excessive and unduly discriminatory, the Authority, on September 18, 1972, again readopted the increased rates. In accordance with strictures believed to have been imposed

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cated to power. It reflects, moreover, no allocations to water for administrative expenses, depreciation, interest on debt and applicable debt capital.

In spite of the showings in the other two reports, the report of R. W. Beck & Associates found the increased rates "fair and reasonable."

[15] The increases by classes were: residential, 18.8%; commercial, 18.8%; street lights, 20.2%; large power (including the Association's members), 24.8%. (App. D, p. 52a, n. 1.)

on it by the court of appeals, the district court issued a final order on October 3, 1972, finding that the Authority had conducted public hearings consistent with the judgment of the court of appeals, and vacating its injunction.

In a decision dated April 12, 1973, a different panel of the court of appeals sustained the district court, basically in reliance on *United States v. Florida East Coast Railway Co., supra.* Using the Administrative Procedure Act for guidance, with only cursory note of 30 V.I.C. § 105(a)(12), and treating *Bi-Metallic Investment Co. v. State Board of Equalization,* 239 U.S. 441 (1915) as applicable here, the court of appeals held that the Authority's rate hearings were required to be rulemaking not adjudicatory hearings. The court considered the hearing procedure on remand proper; this would be so even though adjudicatory facts were involved; and, assuming adjudicatory hearings were required, the procedure would still have been proper, at least with respect to the denial of an opportunity for cross-examination of the Authority's experts, because, in the absence of a local statute such as the Administrative Procedure Act, the courts have "greater leeway", and because the Association had not shown that it had been prejudiced thereby.[16]

Other aspects of the Authority's procedure expressly condoned were the notice and dissemination afforded,[17] the use of unsworn testimony,[18] and the denial of the Association's motion for a continuance.[19] The court also

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[16] App. G, p. 74a.

[17] App. G, pp. 70a-71a.

[18] App. G, p. 71a, n. 9.

[19] App. G, p. 71a.

held that the conduct of the hearings by a member of the Authority's Governing Board was not improper, and finally, that the Authority had not relied on evidence outside the record.[20] Thus, while purporting to affirm the initial holding of the court of appeals that a "meaningful" hearing was mandated by 30 V.I.C. § 105(a)(12), the court below approved the "hearings" afforded on remand. On May 23, 1973, the court of appeals denied the Association's petition for rehearing.

The questions involved are questions of law. No facts are in dispute.

REASONS FOR GRANTING THE WRIT

I. The Court of Appeals Has Decided Important Questions of Statutory Hearing Procedure and Procedural Due Process in a Traditional Administrative Utility Ratemaking Proceeding in a Way Which So Far Departs From Applicable Decisions of This Court as to Call for the Exercise of This Court's Supervisory Power.

1. The decision below seriously misconstrues and misapplies United States v. Florida East Coast Railway Co., 93 S. Ct. 810 (1973).

The court below misapplied the holding of this Court in *Florida East Coast* that, as a matter of procedural due process, the "basic distinction" between rulemaking and adjudicatory proceedings is whether the proceedings are particularized (as in *Londoner v. Denver*, 210 U.S. 373 (1908)), or generalized (as in *Bi-Metallic Investment Co. v. State Board of Equalization*, *supra*).[21] It conceived the Authority's rate proceeding to be generalized because it affects the general public[22] —as, indeed, all administrative ratemaking proceed-

[20] App. G, pp. 74a-75a.

[21] 93 S. Ct. at 820-821.

[22] App. G, pp. 72a-73a.

ings do. In this instance, however, the proceeding affects the Authority alone, not a multiplicity of persons subject to regulation. If the reasoning of the court of appeals were to prevail, all utility ratemaking proceedings would have to be legislative in nature, including those involving ratemaking for privately-owned utilities, whereas trial-type hearings have traditionally been required. (*Infra,* pp. 15-19)

Further, in determining which of the two types of hearings is mandated by 30 V.I.C. § 105(a)(12), the court below sought guidance from the Administrative Procedure Act, 5 U.S.C. § 551, *et seq.*[23] Following the reasoning of *Florida East Coast,* the court concluded that "if the Administrative Procedure Act governed the Authority's ratemaking, the appropriate procedure would be rulemaking . . .".[24]

But there is no ambiguity in the hearing procedure prescribed by 30 V.I.C. § 105(a)(12) to warrant seeking guidance from any other statute, let alone basis in *Florida East Coast* for resorting to the Administrative Procedure Act from which the Authority, a *territorial* agency, is exempt.[25] While this Court there held the Administrative Procedure Act to be "a satisfactory basis for determining what is meant by the term 'hearing' used in another statute," 93 S.Ct. at 818, the other statute involved was a *federal* statute.

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[23] The cases cited by the court fail to support its fallacious distinction between rulemaking and adjudicatory proceedings. App. G, pp. 72a-74a.

[24] App. G, p. 72a. In this connection, it is to be noted that the court below considered the prospective effectiveness of rates as a governing distinction here regardless of the nature of the proceeding.

[25] 5 U.S.C. § 551.

Assuming, *arguendo,* the applicability of the Administrative Procedure Act, the court's conclusion that the appropriate type of hearing would be rulemaking should not have ended the matter, for § 553(c) of that Act requires an adjudicatory hearing if rulemaking is "required by statute to be made on the record after opportunity for an agency hearing." The language of 30 V.I.C. § 105(a)(12) is equivalent to the "on the record" language in § 553(c) of the Administrative Procedure Act. It states that "a public hearing shall be held . . . and upon such hearing," changes in the rate structure may be made. Unlike the "after hearing" language in § 1(14)(a) of the Interstate Commerce Act at issue in *Florida East Coast,* the "upon such hearing" language of the Authority Act should have triggered the adversary hearing requirements of the Administrative Procedure Act in rulemaking proceedings.[26]

Yet, the court below ignored this triggering language. It thereby acted in disregard of this Court's holding in *Florida East Coast,* 93 S.Ct. at 817:

> "Inextricably intertwined with the hearing requirement of the Administrative Procedure Act in this case is the meaning to be given to the language 'after hearing' in § 1(14)(a) of the Interstate Commerce Act."

In *Florida East Coast,* moreover, this Court distinguished the hearing procedure at issue there from that at issue in the second *Morgan* case, *supra,* which it thought defective, 93 S.Ct. at 819,

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[26] *United States v. Allegheny-Ludlum Steel Corp.,* 406 U.S. 742 (1972), discussed and distinguished in *Florida East Coast,* 93 S. Ct. at 819.

> "primarily because the persons who were to be affected by the Secretary's order were found not to have been adequately apprised of what the Secretary proposed to do prior to the time that he actually did it."

The Authority's hearing procedure on remand (with its inadequate notice of the factual issues involved and incomplete record due to the Authority's refusal to meet its burden of proof [27]) failed to apprise those likely to be affected by the increased rates of the basis for the Authority's claim that the rates were reasonable; they were thereby effectively denied the hearing required by statute. Thus, the Authority's hearings suffered from the same "essential formlessness" as those in *Morgan,* by virtue of which this Court distinguished its decision in *Florida East Coast.* But, the court below ignored that fundamental difference and justified its sanction of the Authority's rulemaking hearings. On the one hand, it attempted to distinguish the first *Morgan* case, [28] and on the other, it speciously implied that *Florida East Coast* had discarded the rule of the second *Morgan* case requiring trial-type hearings in traditional administrative ratemaking proceedings as a matter of procedural due process.[29]

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[27] *Commonwealth of Puerto Rico v. F.M.C.*, 468 F.2d 872, 881-882 (D.C. Cir. 1972).

[28] App. G, p. 70a, n. 7.

[29] App. G, p. 77a, n. 1. Other significant differences between *Florida East Coast* and this case were also disregarded by the court below. Thus, unlike the proceeding in *Florida East Coast,* (1) there was no overriding urgency here warranting less than trial-type hearings; (2) there were no "meaningful" hearings here of any sort, either rulemaking or adjudicatory; and (3) there was no open-endedness in the Authority's proceeding.

Still another misapplication of *Florida East Coast* by the court below is its equation of the substitution there of a written submission for oral argument under the exception in § 556(d) of the Administrative Procedure Act with the substitution here of written questions for cross-examination, leading to the conclusion that, because the Association had not shown that it had been prejudiced by the substitution (as per § 556(d)), it would not reverse the district court.[30]

In sanctioning the substitution involved in *Florida East Coast*, this Court said, 93 S. Ct. at 819:

> "... the Act makes it plain that a specific statutory mandate that the proceedings take place on the record after hearing may be satisfied in some circumstances by *evidentiary* submissions in written form only." (Emphasis added)

But written questions are not evidentiary submissions. Moreover, they are proscribed in trial-type rulemaking hearings by § 556(d):

> "A party is entitled . . . to conduct such *cross-examination* as may be required for a full and true disclosure of the facts." (Emphasis added)

Rather than contributing to full and fair disclosure of the facts here, denial of cross-examination prevented exposure of the full extent of the excessiveness of the Authority's increased rates and contributed to the Authority's withholding of evidence of unfairness and undue discrimination in its increased rate schedules. This result is certainly not attributable to *Florida East Coast*, nor for that matter, to greater judicial "leeway", if any, arising out of the absence of a local statute such as the Administrative Procedure Act.[31]

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[30] App. G, p. 74a.

[31] App. G, pp. 73a-74a.

Even in generalized rulemaking proceedings under the Administrative Procedure Act, "basic considerations of fairness" or a "meaningful opportunity to be heard" may dictate oral presentations in lieu of written submissions, and perhaps cross-examination. *Walter Holm & Company v. Hardin,* 449 F.2d 1009, 1016 (D.C. Cir.1971); *American Airlines, Inc. v. C.A.B.,* 359 F.2d 624, 631-632 (D.C. Cir. 1966); *International Harvester Company v. Ruckelshaus,* 478 F.2d 615, 631 (D.C. Cir. 1973).

Whether rulemaking or adjudicatory proceedings are deemed to be called for, the Authority's hearings were a pretense; they were in no sense either fair or meaningful. They satisfy neither the requirements of 30 V.I.C. § 105(a)(12) nor procedural due process.

2. The decision is in conflict with applicable decisions of this Court.

a. Decisions of this Court require trial-type hearings, including cross-examination, in administrative utility ratemaking proceedings.

As already noted, where administrative actions involve resolution of factual issues concerning particular parties, the established principle, grounded in due process, requires a trial-type hearing. *Opp Cotton Mills v. Administrator of Wage & Hour Division of the Department of Labor,* 312 U.S. 126, 152-153 (1941). This Court has held this principle applicable in ratemaking proceedings in order to ensure the fair and reasonable rates intended to result from open, public decision-making. *F.P.C. v. Natural Gas Pipeline Co.,* 315 U.S. 575, 582-583 (1942); *Morgan v. United States, supra,* 304 U.S. at 19-20; *Morgan v. United States, supra,* 298 U.S. at 477-482; *I.C.C. v. Louisville & Nashville Railroad Co.,* 227 U.S. 88, 91-94 (1913). Trial-type hearings have been described as an important proce-

dural "safeguard" against arbitrary agency ratemaking. *Ohio Bell Telephone Co. v. Public Utilities Commission of Ohio,* 301 U.S. 292, 304-305 (1937). In all the above cases and many others, trial-type hearings have been afforded in a ratemaking context.[32]

Ratemaking by a publicly-owned utility is a regulatory function separate from its proprietary function. In the exercise of both functions, it is obliged to act in the public interest. *Springfield Gas & Electric Co. v. Springfield,* 257 U.S. 66, 70 (1921). However, the identity of regulator and proprietor constitutes a conflict of interest which can lead to an intrusion of the proprietary interest upon the exercise of the regulatory function, at the expense of the ratepayers. Thus, the difference between independent public regulation of privately-owned utilities and self-regulation by publicly-owned utilities necessitates stricter procedural safeguards in the latter case.[33] Notwithstanding the identity here of regulator and proprietor, the court of

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[32] *E.g., In re Permian Basin Area Rates Cases,* 390 U.S. 747 (1968); *Market St. Ry. Co. v. Railroad Comm'n of California,* 324 U.S. 548 (1945); *Vinson v. Washington Gas Light Co.,* 321 U.S. 489 (1944); *St. Joseph Stockyards Co. v. United States,* 298 U.S. 38 (1936); *West Ohio Gas Co. v. Public Util. Comm'n of Ohio,* 294 U.S. 63 (1935); *Los Angeles Gas & Elec. Corp. v. Railroad Comm'n of California,* 289 U.S. 287 (1933); *Wichita Railroad & Light Co. v. Public Util. Comm'n of Kansas,* 260 U.S. 48 (1922); *Darnell v. Edwards,* 244 U.S. 564 (1917). And see the reasoning developed and cases cited in *Jordan v. American Eagle Fire Ins. Co.,* 169 F. 2d 281 (D.C. Cir. 1948).

[33] The court of appeals attempted to distinguish the first *Morgan* case, which concerned rates regulated producers could charge, from this case concerning rates the Authority, a self-regulating utility, can charge. The court concluded that the former situation poses a greater danger for uncompensated taking and, therefore, demands stricter procedural due process. App. G, p. 70a, n. 7. That reasoning is plainly unsound.

appeals denied the need for trial-type hearings in this particularized ratemaking proceeding.

One of the most important attributes of trial-type rate hearings is cross-examination. *Market St. Ry. Co. v. Railroad Commission of California, supra; cf. F.P.C. v. Natural Gas Pipeline Co., supra,* 315 U.S. at 583-584. In *Market Street,* while approving street car rates set by a regulatory commission, this Court noted, 324 U.S. at 562:

> "Due process, of course, requires that commissions proceed on matters in evidence and that parties have opportunity to subject evidence to the test of cross-examination and rebuttal."

The protection against arbitrary ratemaking afforded by cross-examination and rebuttal is important in proceedings where rules of evidence are liberally applied. *I.C.C. v. Louisville & Nashville Railroad Co., supra,* 227 U.S. at 93.[34] By divorcing cross-examination from rebuttal, the court of appeals stripped rebuttal of much of its efficacy.

The opportunity for cross-examination is particularly important where there is a strongly contested factual dispute and the inadequacy of one party's factual contentions might not be apparent otherwise.[35] *I.C.C. v. Louisville & Nashville Railroad Co., supra,* 227 U.S. at 93-94. In *Goldberg v. Kelly,* 397 U.S. 254 (1970), this Court recognized the importance of cross-examination in such a situation, at 269:

> "[W]ritten submissions do not provide the flexibility of oral presentations; they do not permit . . .

[34] App. G, 73a-74a.

[35] K. C. Davis, 2 *Administrative Law Treatise* (1958), § 15.14, p. 432.

> [the party] to mold his argument to the issues the decision maker appears to regard as important . . . In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses."

Nevertheless, in the face of strong allegations of inadequate presentation of facts by the Authority and serious conflict of opinion before that body, the court of appeals sustained the denial of an opportunity for cross-examination.

The court held that cross-examination was unnecessary because the Association had failed to demonstrate the inadequacy of written questions.[36] It thereby imposed a negative burden on the Association which is virtually impossible to bear. Yet, the right to cross-examination is inherent in trial-type hearings. This case is not one where a preliminary showing is mandated, *e.g., F.P.C. v. Texaco, Inc.*, 377 U.S. 33, 39-41 (1964), nor is it comparable to the narrowly limited holdings, based on special fact situations, in the cases cited by the court below.[37] To make the Association's right of cross-examination contingent upon a negative demonstration effectively nullifies that fundamental right.

The court of appeals departed from established principle without justification. It cited no applicable decisions. Instead, it sought support from a number

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[36] App. G, p. 74a and n. 11 on that page; compare the concurring opinion, p. 76a.

[37] App. G, p. 72a-74a.

of opinions which have little or no relevancy to this particularized ratemaking case.[38]

b. This Court has established a general principle of constitutional law to be followed in administrative determinations of reasonable rates.

In order to prevent unconstitutional takings of property under the Fifth and Fourteenth Amendments of the Constitution, this Court has established that a determination of reasonable rates must involve two basic steps: (1) the adjustment of the general revenue level to cover reasonable operating costs, including financing costs, and the debt service requirement of bond covenants (in the case of publicly-owned utilities); and (2) the adjustment of rate schedules conforming to that level so as to eliminate undue discrimination and unfairness from their details. *F.P.C. v. Natural Gas Pipeline Co., supra,* 315 U.S. at 584.[39] These two steps are different in character but complementary of one another. They embrace the ratemaking standards of the Authority Act.

On remand, the Authority attempted the first step and failed; it did not attempt the second. The reports of its experts show, beyond contradiction, that the general level of electric revenues yielded by the increased rates exceeds by a substantial margin the

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[38] In addition to its misapplication of *Florida East Coast*, the court cited cases concerning areas such as fire code rules, hospital disciplinary procedures, commercial radio broadcasting-area rules and others of equal irrelevance to a proper determination of procedural requirements in a public utility ratemaking context. App. G, pp. 73a-74a.

[39] Because due process applies equally to the customers of publicly-owned and privately-owned utilities, this ratemaking procedure is equally applicable to all utilities, regardless of ownership. *Cf. Springfield Gas and Elec. Co. v. Springfield, supra,* 257 U.S. at 70.

operating costs allocable to the Authority's electric operations, including a debt service coverage far in excess of the bond covenant requirement. In the absence of cross-examination and rebuttal, the known excesses are minimums; the full extent of the excesses are unknown. Further, the Authority offered no proof that within a proper general revenue level its electric rate schedules are fair and devoid of undue discrimination. Instead, by refusing to meet its burden of proof, the Authority withheld relevant data from the ratepaying public.

The court below ignored the two-step ratemaking principle decreed by this Court and let stand the initial decision of the court of appeals to the effect that 30 V.I.C. § 105(a)(12) does not impose a duty on the Authority to make "rate studies as such." Whatever the meaning of the ambiguous phrase "rate studies as such," the court obviously did not intend to hold that the constitutional principle for determining reasonable rates established by this Court, and reflected in 30 V.I.C. § 105(a)(12), does not apply here. Yet, that is the effect of the refusal of the court below to address itself to that aspect of this case.

II. The Decision Below Wrongly Holds That It Is Within the Authority's Discretion Whether to Comply with Its Statutory Mandates; It Violates Procedural and Property Rights Protected by the Fourteenth Amendment.

1. The decision below disregards and negates the public interest mandate of 30 V.I.C. §§ 101(f) and 105(a) and the ratemaking standard and hearing procedure prescribed by 30 V.I.C. § 105(a)(12); it sanctions the denial of constitutional rights of electric ratepayers.

In practical terms the decision permits the Authority, in its discretion, to employ *any* future cost increase as justification for increasing its electric rates, regard-

less of whether the resulting revenues substantially exceed those needed to cover reasonable electric operating costs and maintain the required debt service coverage, and regardless of whether the increased electric rate schedules are unfair and unduly discriminatory; in short, regardless of whether the increased rates are "reasonable." The decision renders the public interest mandate of 30 V.I.C. §§ 101(f) and 105(a) and the ratemaking standard of 30 V.I.C. § 105(a)(12) nugatory and sanctions ratemaking by administrative fiat.[40] It leaves electric ratepayers in the Virgin Islands vulnerable to arbitrary rate action by the Authority. The decision also denies them protection against unreasonable rates assured by the Fourteenth Amendment of the Constitution.

Moreover, the decision permits the Authority to adopt hearing procedures, in its discretion, regardless of whether they afford its ratepayers any of the traditional safeguards of trial-type ratemaking hearings and procedural due process. It thereby reduces the ratemaking hearings mandated by 30 V.I.C. § 105(a)(12) and the procedural requirements of the Fourteenth Amendment to nullities.

The Authority abandoned its ratemaking function to the consulting engineering firm of Jackson & Moreland by rubber-stamping its recommended rate increases, after hearing which were not "meaningful" by the court of appeals' own definition, in disregard of contradictory evidence from its own consultants as to the need for the increased electric income level, and

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[40] See generally, *e.g.*, *F.P.C. v. Sierra Pacific Power Co.*, 350 U.S. 348, 355 (1956); *In re Permian Basin Area Rates Cases*, *supra*, 390 U.S. at 791.

by withholding proof of the appropriate income level and the propriety of the discrimination introduced by the Authority into the increased electric rate schedules. Additionally, the Authority's hearing procedure failed to include adequate notice of the factual bases for the rate action, advance notice of the unique use of written questions, swearing of the Authority's experts, and testing of their reports by cross-examination and rebuttal.[41]

Yet, the decision below strained to condone the Authority's hearing procedure. Aside from the misapplication and misconception of the decisions of this Court already noted, the court below: (1) made assumptions in favor of the Authority which are unsupported by the record and are contrary to fact or law;[42] (2) disregarded the Authority's failure to meet its burden of

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[41] In the Association's only opportunity for cross-examination of an Authority witness, before the district court, "he testified in essence that the Authority could not determine whether the 'overall rate structure [was] fair' for the reason that a proper rate study had not been made." App. C, p. 42a.

[42] *E.g.*, the assumptions that the new reports commissioned by the Authority in the summer of 1972 were "[t]o comply with this Court's mandate" (App. G, p. 67a); that, in complaining that notice of the hearings on remand was too short, the Association "asks us to ignore . . . the district court's injunction which had been stayed for ten months" (*id.*, p. 70a); that "no reason appears to us that the point there raised [in the Association's offer of proof] could not have been formulated in written questions" (*id.*, p. 74a); that, in essence, the Association's contention that the Authority did not have adequate information available for a determination of reasonable electric rates "is that the Authority does not know how to allocate various expenses between water and power distribution [sic] and does not know how much it costs it to supply power to the various types of power users" (*id.*, p. 75a); and that "the three engineering studies introduced at the hearings seem to provide just this type of information" *(id.)*.

proof as to the reasonableness of its increased electric rate schedules;[43] (3) raised to the level of persuasiveness the Authority's misrepresentation that it cannot obtain financing because of the pendency of this litigation;[44] (4) excused the Authority's otherwise fatal procedural shortcomings because of the Association's three-week delay in hiring a rate expert and the alleged delay of the Association's counsel in requesting an "adjournment" until after counsel had learned that the Authority had misled it into believing that the hearings would be "evidentiary";[45] (5) misrepresented the Association's continuing objection to the Authority's hearing procedure as dereliction by the Association in failing to comply with the procedure complained about;[46] (6) warped the Association's claim of biased decisional officers into a claim of intimidation or denial "of privileges available to other participants;"[47] (7) gratuituously held that the Authority's September 1972 resolution reaffirming its increased rates does not indicate reliance on data outside the record when the language of the resolution cannot reasonably be otherwise construed;[48] (8) con-

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[43] *Commonwealth of Puerto Rico v. F.M.C., supra.*

[44] App. G, p. 71a; compare App. C, p. 36a. The Authority failed to tell the court that it had obtained $15,000,000 last year by the sale of bond anticipation notes, and in any event that *Baldwin-Lima-Hamilton Corporation v. Virgin Islands Water & Power Authority,* Civil No. 544-1971, is still pending in the District Court of the Virgin Islands. Very recently, the Authority refinanced last year's note issue and financed a new capital improvement, totaling $21,000,000.

[45] App. G, pp. 70a-71a.

[46] App. G, p. 74a.

[47] App. G, pp. 74a-75a; compare App. G, p. 78a, n. 3.

[48] App. E, pp. 61a-62a; App. G, p. 75a.

structed non-existent substantive issues;[49] (9) disregarded the Association's complaints of lack of adequate notice of the factual bases for the rate action, lack of reasoned findings in support thereof, and lack of opportunity for argument before the Authority's Governing Board in light of the Board's prior approvals of the increased rate schedules; and (10) treated cavalierly the issue of procedural due process.[50]

2. The decision below frustrates judicial review of, and relief from, the Authority's unlawful and unconstitutional rate actions.

Having approved a meaningless hearing procedure, the decision renders judicial review of the Authority's rate actions meaningless. This is evidenced by the way in which the Authority's hearings on remand frustrated judicial review below. The decision thereby frustrates judicial relief for the Authority's ratepayers from the Authority's illegal and unconstitutional rate actions.

While there are several reasons for the court of appeals' misconceptions about this case, the most obvious ones are the Authority's refusal to bear its burden of proof and to permit cross-examination and rebuttal; lack of adequate findings by the Authority is another.[51] If, however, there had at least been an opportunity, through cross-examination and rebuttal, to dispel the obfuscation and confirm that the increased level of electric income was far in excess of that needed to cover reasonable operating costs and meet the debt service requirement, and that the increased rate sched-

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[49] App. G, pp. 75a-76a.

[50] App. G, 69a-70a.

[51] *In re Permian Basin Area Rates Cases, supra*, 390 U.S. at 792.

ules reflect undue discrimination, the court below would have had to find the increased rates illegal.

The Authority, in short, manipulated its hearings to defeat the public purposes it was created to serve, by withholding from the public data essential to a determination of reasonable rates, and by substituting color of necessity for proof of necessity while, at the same time, preventing the coloration from being shown to be illusory; it thereby also manipulated the outcome of judicial review by the court below.

The Authority's hearing procedure and rate action were patently arbitrary, and contrary to territorial law and the Fourteenth Amendment. Its substitution of government by men for government by law was wrongfully condoned by the decision below. *Joint Anti-Fascist Refugee Committee* v. *McGrath,* 341 U.S. 123, 136 (1951); *e.g., State Highway Commission of Missouri* v. *Volpe,* 41 U.S. L.W. 2539 (8th Cir., Apr. 2, 1973); *American Federation of Government Employees* v. *Phillips,* 41 U.S. L.W 2543 (D.D.C., Apr. 11, 1973).

CONCLUSION

We respectfully urge that the decision below, one of first impression from the Virgin Islands, and one which is violative of the law of the Territory and the Fourteenth Amendment of the Constitution and will profoundly confuse the law of administrative ratemaking procedure at all levels of government, including ratemaking by federal agencies subject to the Administrative Procedure Act, threatens the ratepayers of publicly-owned utilities and publicly regulated private utilities, generally, with deprivation of their constitutional procedural and property rights,

and encourages erosion of our constitutional government of laws. It should be reviewed and reversed by this Court.

Respectfully submitted,

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